

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Formal Complaint No. 77

HON. MICHAEL J. HALEY
Judge, 86th District Court
Bellaire, MI 49615

DECISION AND RECOMMENDATION
FOR ORDER OF DISCIPLINE

At a session of the Michigan Judicial
Tenure Commission, held on
September 12, 2005, at which the
following Commissioners were

PRESENT: Hon. James C. Kingsley, Chairperson
 Hon. Barry M. Grant, Vice Chairperson
 Richard Simonson, Secretary
 Carole L. Chiamp, Esq.
 Diane M. Garrison
 Hon. Kathleen J. McCann
 Thomas J. Ryan
 Hon. Jeanne Stempien
 Hon. Michael J. Talbot

I. INTRODUCTION

The Hon. Michael J. Haley ("Respondent") is a judge of the 86th District Court, which covers three counties: Grand Traverse, Leelenau, and Antrim. Respondent is represented in these proceedings by Brian Einhorn. For the reasons set forth more fully within, the Michigan Judicial Tenure Commission

("Commission") recommends that the Supreme Court ("Court") publicly censure Respondent.

II. PROCEDURAL BACKGROUND

The Commission received a Request for Investigation regarding the Respondent, and assigned it Grievance No. 03-14294. Following a preliminary investigation, receiving Respondent's comments on the grievance, and reviewing his answer to the "28-day letter" issued pursuant to MCR 9.207, the Commission authorized the filing of a formal complaint and a petition for the appointment of a master. Formal Complaint No. 77 was filed in the Commission's offices on November 18, 2004; the petition for appointment of a master was filed in the Court on that same date.

The formal complaint consisted of two counts: Count I involved the acceptance of football tickets from an attorney, and Count II dealt with allegedly false and misleading statements made by Respondent in the course of his communications with the Commission. Respondent filed his answer on December 3, 2004. The Court appointed the Hon. Casper Grathwohl, a retired circuit judge from Berrien County, to serve as the master in an order dated January 5, 2005.

The examiner, counsel for the Respondent, and the master met for a pre-trial on January 20, 2005, in Grand Rapids. A hearing on the formal complaint was

conducted over three consecutive days, beginning on April 6, 2005, in Bellaire, Michigan, the county seat of Antrim County. The master filed his report pursuant to MCR 9.214 on May 9, 2005.

The master essentially found that Respondent had accepted tickets to a University of Michigan football game from Richard Benedict, an attorney. The tickets were offered and accepted while Respondent was on the bench and while a case in which Mr. Benedict was the attorney was before the court. The master concluded as a matter of law that Respondent's "acceptance of the tickets was inappropriate." Master's report, p 5. However, he further concluded that acceptance of the tickets did not rise to the level of judicial misconduct.

The formal complaint also alleged that Respondent had lied when he denied to the Commission that he had written a letter to the Antrim County Sheriff seeking to ban Deputy Terry Skurnit from his courtroom. Deputy Skurnit had witnessed the football ticket incident, intimated that the ticket transaction constituted a bribe, and reported the matter to the Commission. The master found that Respondent had forgotten that he had written the letter.

The examiner filed objections to the master's report on June 15, 2005, objecting only to the findings of fact and conclusions of law regarding Count I, the football ticket incident. The examiner filed no objection to the findings of fact and

conclusions of law regarding Count II, the allegedly misleading statements. Accordingly, Count II is dismissed.

Both sides filed briefs as permitted under the court rules. The Commission heard oral argument at a public hearing on July 11, 2005, pursuant to MCR 9.216.

III. STANDARD OF PROOF

The standard of proof in a judicial discipline proceeding is a preponderance of the evidence. *In re Noecker*, 472 Mich 1, 8; 691 NW2d 440 (2005).

IV. FINDINGS OF FACT

The Commission accepts the Findings of Fact submitted by the master, and, pursuant to MCR 9.220(B)(1), adopts them here by reference. In addition, based on the testimony from the hearing, the Commission makes the following additional findings of fact:¹

1. Richard Benedict and the Respondent had no social relationship; theirs was entirely a professional one. T 348; 474-475 (Respondent); T 146 (Benedict).

¹ The master made no findings regarding the witnesses' credibility. The Commission's supplemental findings of fact are well supported by the record.

2. While in Traverse City a week or two before the incident, Mr. Benedict offered the tickets to anyone who would take them and go to the game. (T 150-151 [Benedict]); (T 372 [Respondent]).
3. Respondent was one of the people who discussed acquiring the tickets with Mr. Benedict at that time. (T 151 [Benedict]); (T 372 [Respondent]).
4. This was the only time that Mr. Benedict had ever given tickets of any kind to the Respondent. T 478 (Respondent); T 170 (Benedict).
5. Respondent's witnesses confirmed that the public was confused about the football ticket transaction.
 - a. Circuit Judge Phillip Rogers testified that "people are confused about what occurred or how it occurred, or who was involved and how it occurred." T 317 (Rogers).
 - b. Brad Niergarth, an accountant from Traverse City and who is also president of the Chamber of Commerce said people were "confused and puzzled" over the transaction. T 338 (Niergarth).
6. Judge Rogers further testified that it is not appropriate for a judge to accept any type of gratuity from an attorney while that attorney has a matter pending before the judge. T 318 (Rogers).

7. Ronald Jolly, a Traverse City talk radio show host, testified likewise: it was not appropriate for Respondent to have taken tickets on the bench. T 247 (Jolly).
8. Respondent, too, concurred with that assessment, agreeing with Judge Rogers that it is improper for a judge to accept football tickets from a litigant or attorney who has a case pending at the time. T 495 (Haley).

V. CONCLUSIONS OF LAW

The master made the factual findings that Respondent accepted the football tickets in open court and that this conduct was “inappropriate.” From these factual findings, however, the master concluded, without any explanation or legal support, that Respondent’s actions do not constitute judicial misconduct as a matter of law. Although the Commission accepts the master’s findings of fact, it rejects the master’s Conclusions of Law for all the reasons set forth below. The Commission concludes that Respondent’s conduct constitutes:

- (a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;
- (b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;
- (c) Failure to establish, maintain, enforce, and personally observe high standards of conduct so

that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

- (d) Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;
- (e) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;
- (f) Failure to conduct oneself at all times in a manner that would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;
- (g) Improper acceptance of a gift from a donor whose interests have come or are likely to come before you, contrary to canon 5C(4)(c);
- (h) Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2); and
- (i) Conduct that is contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3).

In reviewing this matter, the Commission is left with the firm conviction that Respondent's taking of the football tickets constituted judicial misconduct. Respondent's claim that he was merely accepting a "social hospitality" or acting as a conduit or agent for Mr. Benedict to be rid of the tickets is not a defense to (d), (e), (f), or (g), above.

The Michigan Code of Judicial Conduct (“MCJC”) provides that a judge should not accept a gift from anyone, subject to the following exceptions:

(a) A judge may accept a gift or gifts not to exceed a total value of \$100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) A judge or a family member residing in the judge’s household may accept ***ordinary social hospitality***; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.

(c) *A judge* or a family member residing in the judge’s household ***may accept any other gift***, bequest, favor, or loan ***only if the donor is not a party or other person whose interests have come or are likely to come before the judge***, and if its value exceeds \$100, the judge reports it in the same manner as compensation is reported in Canon 6C. [MCJC Canon 5C(4) (emphasis added).]

The only exceptions that could apply in this matter are 5C(4)(b) – ordinary social hospitality – and 5C(4)(c) – donor is not a party or person likely to come before the judge. Respondent fits neither category.

A. Ordinary social hospitality exception, Canon 5C(4)(b)

Michigan has not defined the term “social hospitality” in the context of the Code of Judicial Conduct. However, our sister states of California and Illinois have had occasion to do so.

California defines “social hospitality” as a gift that is so common among people in the judge’s community that no reasonable person would believe that

- (a) The donor intended to or would receive any advantage; or
- (b) The donee would believe that the donor intended to obtain any advantage.

Adams v Commission on Judicial Performance, 10 Cal4th 866, 880; 897 P2d 544 (1995). Illinois defines “social hospitality” as “routine amenities, favors, and courtesies, which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer.” The test is objective and should include the following factors:

- (a) Monetary value of the gift;
- (b) Relationship, if any, between the judge and the donor;
- (c) Social practices and customs associated with gifts; and
- (d) The particular circumstances surrounding the gift.

In re Corboy, 124 Ill2d 29, 42-43; 528 NE2d 694 (1988).

The Commission notes that the Illinois Supreme Court’s test of whether a gift constitutes “social hospitality” is very fact-specific. Although one could imagine numerous factual scenarios in which a judge is offered tickets to a sporting event that may or may not constitute a gift of “social hospitality,” only the instant case is now before us, and we decline to extend our holding beyond the facts presented here. In the case at bar, three of the four factors enumerated in *In re*

Corboy, supra, militate against finding that the gift was one of “ordinary social hospitality.”

- (a) **Monetary value of the gift.** This factor does not play a role in our determination;
- (b) **Relationship, if any, between the judge and the donor.** The testimony established that Respondent and Benedict did not frequent each other’s home and did not socialize together. Respondent candidly admitted that he had no social relationship with Mr. Benedict. T 348 (Respondent). The Commission concludes that their relationship was a professional one only;
- (c) **Social practices and customs associated with gifts.** The testimony established that Mr. Benedict had never given the Respondent football tickets – or any other type of tickets – either before or after this event. Accordingly, the Commission concludes that the giving of such gifts was *not* within their social practices and customs; and
- (d) **The particular circumstances surrounding the gift.** This gift was made while the Respondent was still hearing the case in which Mr. Benedict was appearing as the attorney. Respondent then made an abrupt decision to sentence Mr. Benedict’s client on the spot, an action he could have done, but did not, *before* accepting the gift of the tickets. The circumstances surrounding this matter militate against a finding that the football tickets were ordinary social hospitality.

As noted above, the *Corboy* case is very fact-specific. The case before the Commission, too, is very fact-driven. The facts are that Respondent accepted a gift from an attorney with a case before him, while presiding over that very case, sitting on the bench wearing the robes of judicial office. The Commission concludes that these football tickets, given under these particular circumstances,

were not “ordinary social hospitality.” Respondent’s acceptance of them constitutes judicial misconduct.

B. Gifts from disinterested persons exception, Canon 5C(4)(c)

Judges should not accept gifts “from a party or other person whose interests have come or are likely to come before the judge.” Canon 5C(4)(c). Mr. Benedict appears frequently before the Respondent.² Respondent should not have accepted this gratuity; his having done so constitutes judicial misconduct.

Respondent’s acceptance of the tickets was improper.³ Respondent has maintained that there was no impropriety here because he accepted the tickets on the record in open court. However, taking the tickets – whether openly or secretly – is the gravamen of the improper act. Whether the defendant in the underlying matter received special consideration is irrelevant to a determination of the impropriety of Respondent’s accepting a gift from her attorney and the appearance of impropriety it created. Such conduct necessarily gives rise to suspicions by the public about the impartiality and integrity of the judiciary. Respondent’s acceptance of the football tickets constitutes judicial misconduct.

² T 147 (Benedict)

³ The master found that taking the tickets was “inappropriate.” Master’s report, p 5. The Commission sees no distinction between “improper” and “inappropriate,” a conclusion supported by both the dictionary and the thesaurus.

VI. SANCTION

A. *Brown* factors

The Commission has considered the criteria for assessing proposed sanctions set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (2000). A discussion of each relevant factor follows.

- (a) **misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.**

There is no evidence, and there is no reason to believe, that this was anything other than a one-time incident.

- (b) **misconduct on the bench is usually more serious than the same misconduct off the bench**

Respondent's acceptance of the football tickets took place on the bench, in open court. This factor militates in favor of a public sanction.

- (c) **misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety**

Respondent's acceptance of the football tickets created an appearance of impropriety, but does not seem to have had an actual effect on the administration of justice in this matter. The sentence Respondent imposed was everything the

prosecutor had sought – full restitution for the damages suffered. The *appearance* of impropriety in this matter, however, goes right to the heart of a fair, impartial, and unbiased judiciary.

- (d) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does**

Respondent's acceptance of the football tickets created an appearance of impropriety *per se*.

- (e) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated**

The evidence established that Respondent and Mr. Benedict had discussed the tickets at least a week before their actual delivery.

B. Related Disciplinary Considerations

The Commission is mindful of the Supreme Court's desire for proportionality with respect to sanctions for comparable conduct in Michigan and other jurisdictions. Michigan disciplinary cases involving acceptance of gifts offer little guidance with respect to sanction due to their factual dissimilarity, but confirm the impropriety of such conduct.

The respondent in *In re Lawrence*, 417 Mich 248; 335 NW2d 456 (1983), was found, *inter alia*, to have accepted free personal legal representation from, and assigned indigent criminal cases to, a particular attorney. He was publicly censured, suspended without pay for nine months, and ordered to pay costs and return certain campaign funds improperly retained to contributors or to remit to the State Bar Client Security Fund the amount of \$5,667.97.

The respondent in *In re Jenkins*, 437 Mich 15; 465 NW2d 317 (1991), improperly accepted gifts, favors, loans, and other items of value from litigants and their representatives involved in matters before him, and also failed to report them. He was removed from office, but many other egregious acts were involved, such as engaging in routine solicitation and acceptance of bribes in return for the improper disposition of matters, routine improper *ex parte* communications with litigants and their representatives, and intentionally misrepresenting his residential address on an automobile insurance application, to name a few. Removal is not warranted in the case at bar.

Other states have been confronted with the ethical issue before the Commission today: a judge accepting a gratuity of tickets to a sporting event from an attorney who appears before him. *In re Daghir*, 657 A2d 1032 (Pa, 1995), bears a striking similarity to the instant case. Judge Daghir had presided over a divorce action, the property distribution portion of which was still pending when the judge

was contacted by the defendant-husband about matters unrelated to the litigation. The defendant then offered the judge four Miami vs. Penn State football tickets and a parking pass, and the judge accepted. The Pennsylvania Supreme Court publicly reprimanded the judge and suspended him without pay for seven days.

The Pennsylvania Supreme Court commented:

(a) Judge Dagher demonstrated a **serious lack of judgment in accepting Penn State Football tickets from a person who had a matter of significant financial interest pending before him.**

(b) **Judges are rightly expected to conduct their professional and personal lives in an exemplary manner.** The public has a right to a judicial system in which they can have complete confidence.

(c) **A judge must always be alert to situations that give rise to inherent impropriety. The mere giving of a gift from a lawyer to a judge,** even when the lawyer does not have a case pending before the judge, **implies that there is some string or thread attached to the gift,** unless, of course, the gift arises out of a long-standing personal friendship between the lawyer and judge.^[4]

(d) Accepting gifts from litigants is one of the clearest examples of a situation that a judge must avoid, even if the judicial officer perceives the gift as one that does not have much value, and even if the judge has no intention of bestowing favorable treatment upon the donor in exchange for the gift.

(e) Judge Dagher's acceptance of the tickets demonstrated a fundamental lack of understanding of his position as a jurist and his responsibilities to the public. Judges must always be concerned with not only the presence of actual bias, but the appearance of bias and partiality as well. Judge Dagher failed to recognize that his acceptance of the gift from a litigant created, at a minimum, the appearance of

⁴ There is no evidence in this matter of a long-standing personal relationship. To the contrary, the evidence only supports one conclusion: that the relationship was professional, not personal.

partiality and impropriety. *Such conduct results in the erosion of public confidence and increases the skepticism and cynicism with which the public often views the administration of justice.* Judge Dagher's improper conduct has caused the image of all the members of the Commonwealth's judicial system to be tarnished, and has undermined the public's view of the administration of justice throughout the state. [*Id.* at 1036-1037 (emphasis added).]

In *Office of Disciplinary Counsel v Lisotto*, 94 Ohio St 3d 213; 761 NE2d 1037 (2002), the judge accepted up to two tickets to attend a maximum of eight Pittsburgh Steelers National Football League home games per season from an attorney who appeared as counsel of record in numerous cases before that judge. The Ohio Supreme Court accepted the findings, conclusions, and recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court that this conduct violated the Code of Judicial Conduct in that a judge shall not accept a gift from a person who has come or is likely to come before the judge and a judge shall avoid the appearance of impropriety in all of the judge's actions. The Supreme Court publicly reprimanded the judge.

In *Inquiry Concerning Luzzo*, 756 So2d 76 (Fla, 2000), the judge accepted free tickets to Florida Marlins baseball games approximately fifteen times over the course of four years from a law firm that regularly appeared before him. The judge stipulated to be disciplined, and the Florida Supreme Court found that the judge's conduct violated the Code of Judicial Conduct in that a judge shall:

- personally observe those standards so that the integrity and independence of the judiciary may be preserved;

- avoid impropriety and the appearance of impropriety in all of the judge's activities;
- respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;
- not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment;
- not permit others to convey the impression that they are in a special position to influence the judge; and
- not accept a gift from a person who has come or is likely to come before the judge.

The Florida Supreme Court publicly reprimanded the judge.⁵

The Commission finds these cases, and especially the *Daghir* case, provide excellent guidance in fashioning a sanction recommendation. The Respondent in this matter, like the respondents above, accepted tickets from an attorney who had a matter pending before the judge at the time. This conduct necessarily “results in the erosion of public confidence and increases the skepticism and cynicism with which the public often views the administration of justice.” *Daghir, supra* at 1037.

These judges all received public censures; however, Judge Daghir also received a seven-day suspension without pay. Respondent's misconduct, being of the same nature and magnitude, warrants no less. Thus, the Commission


⁵ The Florida Supreme Court noted that “when the conduct of a jurist is so egregious as to require a public reprimand, such reprimand should be issued in person with the defaulting jurist appearing before this Court” for its administration. 756 So2d at 79. Perhaps the Michigan Supreme Court ought to consider returning to this practice.

recommends a public censure. While we respect our fellow Commissioners' dissenting views, and agree with many of them, we cannot subscribe to the sanction they believe should be imposed. The principle of proportionality and the cases discussed above do not justify, in our view, a 30-day suspension without pay.

VII. CONCLUSION

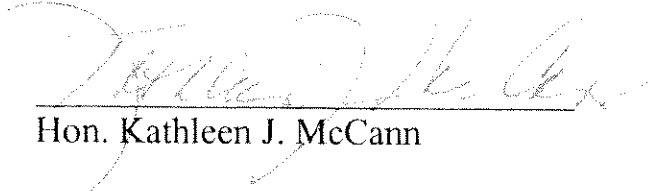
Respondent's conduct has been the subject of much debate. Respondent's conduct significantly harmed the public's perception of the judiciary. Respondent's own witnesses testified that Respondent's actions were improper. The Commission hopes that that public confidence in the integrity of the judiciary can be restored by the faithful workings of the judicial disciplinary system. Accordingly, the Judicial Tenure Commission recommends that the Supreme Court publicly censure Respondent.

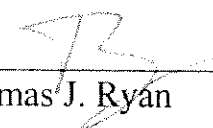
STATE OF MICHIGAN JUDICIAL TENURE COMMISSION



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(PARTIAL CONCURRENCE/PARTIAL DISSENT)

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Concurring in part/Dissenting in Part

We find the case before us clear-cut. The Respondent was conducting a trial, a plea was entered, accepted, and a formal date set for sentencing. The defense attorney of record (a former judge himself) immediately asked to approach

the bench and was granted permission. At the bench a discussion occurred between the Respondent and the defense attorney. Two college football tickets were physically placed on the bench and slid across to the Respondent. The Respondent questioned the defense attorney for clarification on the date and payment, and then took the tickets. The Respondent subsequently altered the course of the trial by imposing sentence right then stating to the attorney he would save him the trip back. These are the facts, they were recorded and a transcript provided, and they are not in dispute.

We concur with the majority's findings of fact and conclusions of law. However, we dissent from the recommended sanction of only a public censure and further urge a suspension without pay for 30 days.

The Respondent's reply and testimony provided by Respondent's attorney at the hearing describe the incident as in a "gray" area or it being "abstract" in nature. The argument is the Respondent was "ambushed" or "caught by surprise" because of the actions of the defense attorney. Canon 5C(4) is clear that a judge should not accept a gift, specifically from a donor whose interests have come or are likely to come before the judge. 5C(4). He *was* in fact before the judge in a criminal case representing the defendant. We do not find the acceptance of the tickets on the bench either gray or abstract. In fact it gives us serious cause for concern that his immediate, instinctive reaction was not to reprimand the attorney for placing the

tickets on the bench and order them removed, or to initiate more serious action. No, his response was to take the tickets.

There was no reasonable argument or fact presented convincing us the Respondent appreciates the severity of his action. It is abundantly clear to us, though, that a judge taking a gift from a lawyer with a case before him – while sitting on the bench no less – severely harms the judiciary and the appearance of propriety. His actions may well have a negative reflection on judges everywhere. The ultimate result is erosion of the public's respect and confidence in the judiciary and our judicial system.

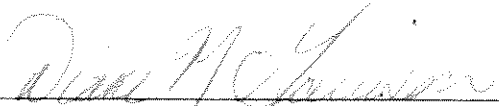
What is most offending is this whole thing took place on the bench of a courtroom that belongs to the people of the state of Michigan. By popular vote the people bestowed on him the honor of serving them. They put their confidence and *trust* in him to render justice fairly to all who come before him. His actions violated that trust.

On its appearance the most severe conclusion that can be drawn is a bribe was offered and accepted by a judge during a trial. The least is that the judge's behavior was inappropriate. Either way it was wrong.

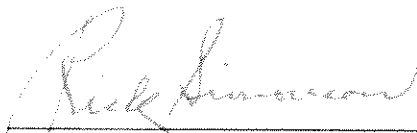
A sanction should make clear not only that this conduct was wrong, it should be strong enough that others will know that it is an extremely serious violation and will not be tolerated. Accordingly, while we respect the opinion of the majority,

we recommend that the Supreme Court publicly censure Respondent and suspend him, without pay, for a period of 30 days.

**STATE OF MICHIGAN
JUDICIAL TENURE COMMISSION**



Diane M. Garrison



Richard D. Simonson

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